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IN THE
COURT OF APPEALS OF INDIANA

CAROLE PEARISON,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 77A01-0608-CV-329
	)	
JAMES PEARISON, JR.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable R. Paulette Stagg, Special Judge
Cause No. 77C01-0311-DR-353

March 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Carole Pearison ("Mother") appeals an order that denied her petition to modify custody[1] and support and that found her in contempt for violating prior court orders concerning the parenting time of James Pearison ("Father"). We affirm.

Issues

Mother raises four issues, which we consolidate, reorder, and restate as follows:

I. whether the court abused its discretion in failing to consider evidence prior to November 30, 2005;

II. whether the court abused its discretion by ordering Mother and Father to submit to polygraph testing; and

III. whether the court utilized and correctly applied the proper standard when it decided not to alter the visitation granted to Father, the non-custodial parent, per the original dissolution decree.

Facts and Procedural History

Mother and Father married on May 22, 2001, separated on November 3, 2003, and divorced on March 17, 2004. Appellant's App. at 21. Pursuant to the parties' "Agreement of Settlement," Mother and Father were to share legal custody of M.P., who was born on January 30, 2002. *Id*. at 22. Mother was to have physical custody, and Father was to have visitation "in accordance with the Sullivan County Court Guidelines." *Id.* at 22-23.

On January 5, 2005, Mother filed a petition for order of protection in which she alleged that Father had physically accosted her during a custodial exchange of M.P.

[1] Although Mother seems to use the terms custody and visitation interchangeably, this appeal centers upon visitation.

Appellant's Br. at 2; Exh. 2.[2] On May 24, 2005, Mother apparently filed another protective order petition, this one on M.P.'s behalf, alleging that Father had molested M.P. Appellant's Br. at 2.[3] On June 3, 2005, Father filed a motion for rule to show cause, in which he evidently alleged that Mother improperly denied him parenting time based on unfounded accusations that he was inappropriately fondling M.P. App. at 9; Appellant's Br. at 2, 5; Exh. 2.

On June 30, 2005, following a hearing on the matters, Judge P.J. Pierson of the Sullivan Circuit Court stayed the protective order, noted that it would not hear Father's rule to show cause at that time, and required the Sullivan County Department of Child Services and prosecutor's office to investigate the allegations and/or submit a report to the court. Exh. 2. In addition, the court found, "both parties shall submit to a polygraph examination forthwith and the results of said examination shall be forwarded" to the court. *Id*. at 1. The court also appointed a victims advocate and a CASA for M.P., ordered M.P. to continue in counseling, and required the parties to sign medical releases to have M.P.'s records forwarded to the court. *Id*. at 2. The court indicated that Father "shall" have supervised, but

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[2] In the statement of the case section of her appellant's brief, Mother cites Exhibit 16 as the source for the contents of the protective order. Given the lack of a tab for Exhibit 16 and the fact that no page numbers appear on the exhibits volume, we have not been able to find this January 2005 petition. The only document we found that *may* support this is the June 30, 2005 order referencing *a* protective order. However, because Father does not challenge this portion of Mother's statement of the case, we will assume that such a protective order petition was filed.

[3] Again, Mother cites Exhibit 16, Father does not challenge this statement, and we cannot locate the protective order petition alleging molestation. In her appellant's brief, Mother states that M.P. told her that "Father had touched her genital area on repeated occasions during his parenting time and that as a result, it hurt when she went 'potty.' . . . Mother observed that M.P.'s genital area was swollen and red." Appellant's Br. at 5. However, Mother provides no citation for these assertions.

not overnight, visitation of M.P., which would take place at the paternal grandmother's house following a walk-through and a criminal history check. *Id.* The court warned the parties, "if there are problems or difficulties in regards to visitation then all visitation shall be terminated and [M.P.] shall be removed from both parties and shall become a ward of this Court." *Id*.

On July 19, 2005, Father submitted to a polygraph examination conducted by the Indiana State Police. App. at 32. No opinion could be reached due to Father's asthmatic breathing. *Id*. at 33. On July 28, 2005, M.P. was evaluated by a social worker and a physician, both of whom reached inconclusive results. Exh. 13 (letters from Kay Holland and Roberta Hibbard, M.D.). On August 24, 2005, Mother underwent a polygraph test. App. at 36-37. The examiner's analysis revealed: "it is the opinion of this examiner that [Mother] did not tell the complete truth during her examination[.]" *Id.* at 37.[4] On November 2, 2005, Father was retested, and that polygraph examiner's analysis revealed: "it is my opinion [Father] did not sexually molest [M.P.] by fondling and or rubbing her vagina." *Id*. at 34-35.

In mid-November 2005, Father filed a motion to rescind the June 30, 2005 order. App. at 10. On November 30, 2005,[5] following a hearing, Judge Pierson and Magistrate Ann Smith Mischler issued an order, stating, "The Court, having reviewed the results of the polygraph, the report from the Sullivan County Department of Child Services and hearing

[4] After discussing the test results with the examiner, Mother denied instructing M.P. to lie about allegations, but acknowledged that the additional attention received by M.P. could have "sparked [M.P.] to continue to make allegations against her father in order to keep getting so much attention from her mother. [Mother] said that thirty to forty percent of her felt she may have caused a response from [M.P.] about her father by showing [M.P.] so much attention to her once the allegations were originally made." App. at 37.

[5] Around this same time period, Mother's third attorney (who is also handling her appeal), entered his appearance. App. at 10.

oral arguments now grants [Father's] Motion to Rescind Order." Exh. 3 at 1. That same order outlined how Father's visitation was to resume gradually and eventually revert to regular overnight visitation. *Id*. The court also dismissed the previously issued protective order. *Id*. at 2.

On December 5, 2005, Mother filed a "petition to modify custody and support" and a motion for change of venue from judge. App. at 11 (chronological case summary; no copy of the petition or the motion appears in the materials submitted on appeal); Tr. at 25. The court granted the motion for change of judge, and Special Judge R. Paulette Stagg assumed jurisdiction. App. at 11. On December 18, 2005, according to Mother's later testimony, M.P. returned from her first unsupervised visit with Father and complained that "her pee-pee hurt." Tr. at 27. Mother detected redness, which she "knew" was not diaper rash, on and around M.P.'s vaginal area. *Id*. at 28.

During the next couple of months, Father exercised visitation twelve times. Mother eventually testified that after seven of the twelve visits, M.P. returned with signs of genital redness. *Id*. at 30-52. On February 19, 2006, upon picking up M.P. from an overnight visit with Father, Mother immediately drove her to Good Samaritan Hospital's emergency room for evaluation. *Id.* By this time, (1) Mother had taken M.P. to see physicians on various occasions complaining of sexual abuse, (2) M.P. had undergone "multiple rape kit tests" that all returned negative, and (3) ensuing investigations uncovered no evidence of any abuse. Exh. 8 (2/19/06 Good Samaritan Hospital record of Dr. Suanes, attending physician). The

February 19, 2006 hospital examination revealed redness in M.P.'s genital and peri-rectal area. *Id*. Thereafter, Mother unilaterally restricted Father from exercising parenting time.

Around that time, Sullivan County asked Knox County to perform an unbiased evaluation in this case. Accordingly, on February 20, 2006, Martha Beasley of the Knox County Department of Child Services conducted a twenty-minute independent "courtesy interview" of M.P.[6] Tr. at 74. Beasley forwarded the results of her interview to Sullivan County. *Id*. at 76.

Apparently driven by Mother's claims of conflict/dissatisfaction with Sullivan County's handling of the situation, Sullivan County requested Clay County to conduct an investigation in early March 2006. *Id*. at 86, 93. As a result, Linda Ehrhart of the Clay County Department of Child Services spoke with Father, Father's parents, Father's two sons from a prior marriage, Mother, and Mother's parents. *Id*. at 87. In addition to meeting with Father at her office, Ehrhart conducted an unannounced visit at his home; Father was cooperative. *Id.* When Ehrhart attempted an unannounced visit with Mother, Mother neither invited Ehrhart inside nor signed the form that would release M.P.'s therapy records for review. *Id*. at 87-90. After gathering and reviewing all available required information, including medical records, police records, and Beasley's interview results, Ehrhart could not substantiate the allegations against Father. *Id.* at 90, 94.

[6] Beasley testified that M.P. stated that her "daddy touched her on her pee-pee with her pants and underwear down with his finger[.]" Tr. at 75. However, Beasley was neither permitted to testify as to her assessment of M.P.'s credibility nor asked about the context of M.P.'s statement. Evidence was introduced indicating that at some time during 2005, M.P. had suffered from a yeast infection, which was treated with Nystatin creme. Exh. 8.

On March 7, 2006, Father filed a motion to reappoint CASA, a petition for modification of custody and support, a motion for rule to show cause, and a motion for emergency hearing. *Id.* at 12 (chronological case summary; again, no copies of these submissions appear in the materials on appeal). Two days later, Special Judge Stagg entered an "Order to Modify Custody and Support and Order to Appear at Hearing to Show Cause" set for April 21, 2006. *Id.*[7] On March 20, 2006, the court denied Father's request for an emergency hearing and for the reappointment of the CASA.

On April 21, 2006, Special Judge Stagg heard evidence and argument on the motions, accepted numerous stipulated exhibits, ordered Mother to release M.P.'s counselor's records, and took the matter under advisement. In a letter dated April 17, 2006 and labeled Exhibit 17, Dr. Bridget Roberts-Pittman noted that on January 5, 2006, Mother initiated therapy for M.P. because Mother suspected that she was being molested by Father. After seeing M.P. for nine more therapy sessions, Dr. Roberts-Pittman provided the following impression:

> In therapy, [M.P.] is engaging and verbal. She actively participates in the therapy process. The focus of treatment is for [M.P.] to feel safe to discuss any inappropriate sexual contact toward her in the event that she has experienced such actions. The therapy process takes a great deal of time for children of her age to feel safe enough to talk openly. I anticipate that I will continue to see [M.P.] for individual therapy to address coping skills.

Exh. 17.

On July 10, 2006, Special Judge Stagg entered an order, determining that Mother "shall retain custody subject to [Father's] right of parenting time pursuant to the Indiana

[7] Again, we cite to the chronological case summary because no copy of this order appears in the materials on appeal. Given that neither party mentions this particular order, we have no idea what, besides setting a hearing date, this order may have accomplished.

Parenting Time Guidelines," that support "shall continue" at $67.00 per week, and that Mother was in contempt for violating prior court orders concerning Father's parenting time. App. at 14-15. The court also found, *inter alia*, that Mother did not present sufficient evidence that Father was molesting M.P., that Father had not established that custody modification was in M.P.'s best interests, and that Mother had maligned Father and interfered with his visitation. *Id*. at 14. Additionally, while the court found that attorney fees were warranted for Father's lawyer, none were assessed due to lack of evidence regarding the proper amount. *Id.*

Discussion and Decision

I. Evidence Prior to November 30, 2005

Mother acknowledges Indiana Code Section 31-17-2-21(c), which generally prohibits the admission of evidence regarding matters that occurred "before the last custody proceeding." However, she contends that at the November 30, 2005 hearing, the parties were not permitted to present evidence regarding changes that may have occurred between the March 2004 dissolution and the November 30, 2005 hearing. Therefore, she maintains, at the April 2006 hearing, the court could have accepted evidence regarding such changes without violating Indiana Code Section 31-17-2-21(c). Father responds with a waiver argument and by asserting that the court actually did receive evidence regarding relevant, pre-November 30, 2005 events.

Mother proffered no evidence that should have been admitted but was not. As such, Mother has not demonstrated harm, and we must conclude that her argument is without merit. Moreover, despite the fact that the court initially noted that only post-November 30, 2005

evidence would be admitted, the bulk of the exhibits volume[8] consists of information about pre-November 30, 2005 activities. For example, Exhibit 6 is a copy of the report submitted to the court regarding a requested walk-through of the paternal grandmother's home. The walk-through occurred on July 7, 2005 and the report was received July 15, 2005. Exhibit 7 is composed of (1) a copy of a June 8, 2005 letter from a psychologist reporting on a statement M.P. made at a May 25, 2005 therapy session, and (2) a report from the emergency room doctor who saw M.P. on February 19, 2006, and which references, *inter alia*, Mother's "multiple" prior reports of Father to Child Protective Services. Exhibit 8 contains M.P.'s medical records, some from as early as March 2005, from Good Samaritan Hospital. Exhibit 9 consists of M.P.'s medical records from the office of pediatrician Dr. Noel O. Suanes; these records date back to M.P.'s birth. Exhibit 10 contains M.P.'s Good Samaritan Hospital laboratory records, again dating as far back as her birth. Exhibit 12 is a copy of an August 14, 2005 letter and report from Kay Holland regarding a July 28, 2005 assessment of M.P. Numerous other pre-November 30, 2005 records/documents (including child welfare documents as well as lengthy letters from Mother and her family detailing their negative perceptions of Father and his actions) appear in the exhibits volume. In sum, Mother has not demonstrated reversible error in this regard.

II. Polygraph Testing

Mother challenges the court's "order" that "requires" each party to submit to a polygraph test. She claims that she did not agree to a polygraph, and she characterizes such

[8] Again, the parties stipulated to the exhibits.

examinations as unreliable. Father responds that Mother did consent to the polygraph and that, in any event, the time for appealing the polygraph order has long since passed.

Polygraph examinations are generally inadmissible absent a valid stipulation between the parties. *See Harris v. State*, 481 N.E.2d 382, 384 (Ind. 1985). Where there is a valid stipulation, the trial court has discretion to admit polygraph results. *Id*. While in criminal cases, a stipulation must be in writing and signed by both defendant and prosecutor, there is no similar requirement in civil cases. *See Sauzer-Johnsen v. Sauzer*, 544 N.E.2d 564, 568-69 (Ind. Ct. App. 1989). Once the parties stipulate to the admissibility of polygraph evidence, they are estopped from objecting to its admission – regardless of whether the examination yields unfavorable results. *See Lyons v. State*, 431 N.E.2d 78, 80 (Ind. 1982); *see also Sauzer*, 544 N.E.2d at 589-69.

Although on appeal Mother claims that she did not consent to the polygraph testing, a transcript of the June 30, 2005 hearing (which presumably would shed light upon this question) does not exist. What we do know is that Mother did not refuse to take the polygraph examination or attempt to appeal the June 30, 2005 order wherein the court found that she and Father "shall submit to a polygraph examination." App. at 18. Inasmuch as Mother is now attacking the validity of that June 30, 2005 order, we are unable to render effective relief, and the issue is moot. *See Stratton v. Stratton*, 834 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (noting that trial court had made a final custody determination, hence attack on temporary custody determination was moot).

By the time of the November 30, 2005 hearing, the court had in its possession not only the polygraph results, but also a positive study of the paternal grandmother's home and a

report from "DCS [stating] that there's no reason for the continued supervised visitation in their opinion to continue." Tr. at 5. At that November 30, 2005 hearing, the court stated, "it's my understanding that both parties agreed to submit to a polygraph examination." *Id.* at 2. Mother's counsel neither contradicted this statement nor objected to any admission of the polygraph examination results. Further, Mother's polygraph examination report contains a polygraph waiver, which states: "Before the examination [Mother] read and signed a statement assuring the polygraph examiner that the examination was being taken voluntarily." Exh. 5 at 1.

At the April 2006 hearing, the following colloquy occurred:

> THE COURT: . . . . Gentlemen, how do you want to start? We did talk about some stipulations. Should we go ahead and put that on the record?
> [FATHER'S COUNSEL]: I would agree, Your honor. Your Honor, counsel and I have discussed and we have made a stipulated exhibit book for the Court in this cause. We have . . . We request that the Court allow us to stipulate the exhibits one through thirteen[9]. And I would ask that those matters be placed into the court's record.
> THE COURT: And they indeed are stipulated, [Mother's Counsel], is that correct?
> [MOTHER'S COUNSEL]: Correct, Your Honor.
> THE COURT: Okay.
> [MOTHER'S COUNSEL]: Just with respect to the issue of the polygraph results and tests as we discussed.
> The Court: To which you wish to object for the record.
> [MOTHER'S COUNSEL]: Which we, which I wish to object for the record, Your Honor.
> THE COURT: Okay. All right. Normally it's a well-founded objection. But that time's been passed and gone and we're beyond appellate time on it. It's part of the record so there it is.
> [MOTHER'S COUNSEL]: Thank you, Your Honor.

[9] Exhibits 4 and 5 are the polygraph examination results.

Tr. at 13. As the above excerpt indicates, while both parties stipulated to the admission of various exhibits, including the polygraph results, Mother simultaneously "objected" to the polygraph examination results and tests. Indeed, that objection represents the first time that Mother registered any issue regarding the polygraph examination conducted eight months prior. Unfortunately, we cannot tell from the limited record presented to us on appeal what the substance of her objection was. While it seems that some discussion occurred on the matter outside the record, Mother's failure to adequately preserve her concern *on the record* precludes our review.

Given the evidence before us, we cannot say that Mother did not consent to the polygraph test. More importantly, in light of Mother's failure to challenge the examination until *after* she learned of the results, which were unfavorable to her, but favorable to Father, her belated claim that she did not voluntarily submit to the test seems suspect. We cannot help but wonder whether she would have made such an argument had her results been different; that is, if hers had been positive and Father's had been damaging. We conclude that the court did not abuse its discretion when it admitted the polygraph examination reports along with the numerous other exhibits and testimony.

III. No Abuse of Discretion

Finally, Mother questions the standard applied by the court and claims that it abused its discretion when it did not alter the custody/visitation portion of the original dissolution decree. She asserts that sufficient evidence was submitted to warrant modifying the visitation rights granted to Father in the March 2004 decree. For support, Mother cites her own testimony, the testimony of her daughter from a prior marriage, and inflammatory

snippets without context. She also faults the court for not including a specific finding that visitation with Father would be in M.P.'s best interests and would not endanger M.P.'s health or significantly impair her emotional development.

"The right of parents to visit their children is 'a sacred and precious privilege' which should be enjoyed by non-custodial parents." *Stewart v. Stewart*, 521 N.E.2d 956, 960 (Ind. Ct. App. 1988), *trans. denied*. To that end, our legislature has outlined the following parameters:

> (a) A parent not granted custody of the child *is* entitled to reasonable parenting time rights *unless* the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development.
>
> (b) The court may interview the child in chambers to assist the court in determining the child's perception of whether parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development.
>
> (c) The court may permit counsel to be present at the interview. If counsel is present:
>
> (1) a record may be made of the interview; and
>
> (2) the interview may be made part of the record for purposes of appeal.

Ind. Code § 31-17-4-1 (emphases added). The court "may" modify an order "granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court *shall not* restrict a parent's parenting time rights *unless* the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development." Ind. Code § 31-17-4-2 (emphases added).

When reviewing a court's determination concerning visitation by a non-custodial parent, "we may reverse only on a showing of manifest abuse of the trial judge's discretion." *See Carter v. Dec*, 480 N.E.2d 564, 566 (Ind. Ct. App. 1985). An abuse of discretion will

not be found unless the court's decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Pence v. Pence*, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996). On appeal, we examine the decision of the trial court and determine whether the record discloses evidence or reasonable inferences to be drawn therefrom that serve as a rational basis to support the finding of the trial court. *See id*. In doing so, we may not reweigh the evidence or judge the credibility of the witnesses. *Id*.

Although on appeal Mother downplays the molestation allegations lodged against Father, such allegations formed the crux of Mother's argument to support her petition to restrict Father's visitation. *See* Appellant's Br. at 19 (noting "question of whether Mother could modify Father's custody *based on evidence supporting the molest allegations*") (emphasis added); *see also* Tr. at 25-53 (Mother's testimony, much of which dealt with molest allegations). Accordingly, it comes as no surprise that in the July 10, 2006 order, Special Judge Stagg attempted to address Mother's concern directly:

> 1. That [Mother] did not present sufficient evidence to establish that [M.P.] has been molested by [Father].
>
> 2. That [Father] did not establish that modification of custody was in [M.P.'s] best interests although the court believes there had been a substantial change in one or more to the factors listed in Ind. Code § 31-17-2-8, specifically, there has been a substantial change in the interaction and interrelationship of [M.P.] with the parents, siblings and other persons who significantly affect the child's best interests.
>
> 3. That [Mother] has done all in her power to portray [Father] as an evil parent in her other daughter's mind and in her own mother's mind such that each of those individuals is willingly involved with [Mother] in interfering with [Father's] parenting time and in having [M.P.] subjected to ongoing and repetitive physical examinations after nearly each and every visit. [Mother]

> has enlisted her family to assist in appealing to several agencies and numbers of individuals, ostensibly for the well being of the child, to interfere with and terminate [Father's] visitation.
>
> 4. That [Mother] has willfully violated prior orders of this court as to [Father's] parenting time and, as such, is in contempt of court. Punishment is taken under advisement pending compliance with this most recent order.
>
> 5. That sufficient evidence was presented to warrant an award of attorney fees to [Father] because of [Mother's] interference with parenting time. However, [Father] presented no evidence as to an amount to be assessed, thus, no award is granted.

App. at 14.

Thus, it is true that the court did not include an explicit finding that Father's parenting time would not endanger M.P.'s physical health or significantly impair her emotional development. However, given Mother's fixation on the molestation allegation, the court's first finding was essentially a more specific negative answer to the endanger-physical-health/significantly-impair-emotional-development question. *Cf. J.M. v. N.M.*, 844 N.E.2d 590, 599-600 (Ind. Ct. App. 2006) ("the finding that Father's 'behavior continues to be detrimental to the mental health, well being, emotional stability and development' of M. is tantamount to a finding that unsupervised parenting time would significantly impair M.'s emotional development."), *trans. denied*. Of additional importance is what the court did *not* find in the present case. The court did not find that Father's "parenting time might endanger [M.P.'s] physical health or significantly impair [her] emotional development." Ind. Code § 31-17-4-2. Absent such a finding, the court was precluded by Indiana Code Section 31-17-4-2 from modifying Father's parenting time.

Furthermore, in light of the materials presented for our review,[10] we cannot conclude that the court abused its discretion in finding that Father's parenting time should not be modified. Regardless of whether we would have reached the same conclusion had we been the lower court, to reverse on appeal would constitute an impermissible reweighing of evidence. We simply cannot say that the court's decision was clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *See MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940-41 (Ind. 2005) (noting "this deference is a reflection, first and foremost, that the trial judge is in the best position to judge the facts, to get a feel for the family dynamics, to get a sense of the parents and their relationship with their children--the kind of qualities that appellate courts would be in a difficult position to assess.").

Affirmed.

SHARPNACK, J., and SULLIVAN, J., concur.

[10] We set out the relevant facts in our Facts and Procedural History.